

Michael H. Bierman, State Bar No. 89156
Michael E. Pappas, State Bar No. 130400
LUCE, FORWARD, HAMILTON & SCRIPPS LLP
601 S. Figueroa, Suite 3900
Los Angeles, California 90017
Telephone: 213.892.4992
Facsimile: 213.892.7731
E-Mail: mbierman@luce.com
mpappas@luce.com

Attorneys for Plaintiff and Intervenor, National Credit Union Administration Board
As Conservator For Western Corporate Federal Credit Union

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NATIONAL CREDIT UNION
ADMINISTRATION BOARD AS
CONSERVATOR FOR WESTERN
CORPORATE FEDERAL CREDIT
UNION,

Plaintiff,

v.

ROBERT A. SIRAVO, TODD M. LANE,
ROBERT J. BURRELL, THOMAS E.
SWEDBERG, TIMOTHY T. SIDLEY,
ROBERT H. HARVEY, JR., WILLIAM
CHENEY, GORDON DAMES, JAMES
P. JORDAN, TIMOTHY KRAMER,
ROBIN J. LENTZ, JOHN M. MERLO,
WARREN NAKAMURA, BRIAN
OSBERG, DAVID RHAMY and
SHARON UPDIKE,

Defendants.

Case No.: CV10-01597 GW (MANx)

**OPPOSITION OF PLAINTIFF
NATIONAL CREDIT UNION
ADMINISTRATION BOARD AS
CONSERVATOR FOR WESTERN
CORPORATE FEDERAL CREDIT
UNION TO DEFENDANT TODD
LANE'S MOTION TO DISMISS
FIRST AMENDED COMPLAINT**

Date: December 20, 2010

Time: 8:30 a.m.

Judge: Hon. George Wu

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

Page

INTRODUCTION		1
THE ALLEGATIONS AGAINST LANE IN THE FIRST AMENDED COMPLAINT		1
APPLICABLE LEGAL STANDARD		3
LEGAL ARGUMENT.....		4
I. THE BUSINESS JUDGMENT RULE DOES NOT APPLY TO LANE.		4
II. THE COMPLAINT PLEADS CLAIMS AGAINST LANE FOR BREACH OF FIDUCIARY DUTY AND GROSS NEGLIGENCE.		5
A. The First Amended Complaint Sufficiently Alleges Negligent Breach Of Fiduciary Duty As To Lane.....		5
B. The Allegations Against Lane Are Sufficient To State A Claim For Gross Negligence.....		6
C. The First Amended Complaint Sufficiently Alleges Lane’s Roles and Responsibilities Under Rule 8.....		7
CONCLUSION.....		9

TABLE OF AUTHORITIES

Page

CASES

<i>Ashcroft v. Iqbal</i> , - U.S.-, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009).....	4
<i>Balistreri v. Pacifica Police Dep't</i> , 901 F.2d 696 (9th Cir. 1988)	3
<i>Bancroft-Whitney Co. v. Glen</i> , 64 Cal. 2d 327 (1966).....	6
<i>Brummett v. County of Sacramento</i> 21 Cal. 3d 880 (1978).....	6
<i>GAB Business Services, Inc. v. Lindsey & Newsom Claim Services, Inc.</i> , 83 Cal. App. 4th 409 (2000).....	5
<i>Gilligan v. Jamco Development Corp.</i> , 108 F.3d 246 (9th Cir. 1997).....	4
<i>Guth v. Loft</i> , 23 Del. Ch. 255, 5 A.2d 503 (1939).....	6
<i>Laird v. T. W. Mather, Inc.</i> , 51 Cal. 2d 210 (1958).....	6
<i>Reeves v. Hanlon</i> , 33 Cal. 4th 1140 (2004).....	5
<i>Sprewell v. Golden State Warriors</i> , 266 F.3d 979 amended on other grounds, 275 F.3d 1187 (9th Cir. 2001).....	4

STATUTES

Federal Rule of Civil Procedure Section 12(b)(6).....	4
--	---

INTRODUCTION

Defendant Todd M. Lane ("Lane") was the Chief Financial Officer of the Western Corporate Federal Credit Union ("WesCorp") and functioned as its second-in-command. Lane has moved to dismiss the First Amended Complaint filed by the National Credit Union Administration Board as Conservator for Western Corporate Federal Credit Union (the "NCUA") (1) on the grounds stated in the motion to dismiss filed by the Directors; and (2) because the First Amended Complaint does not contain sufficient allegations specifically about him to state valid claims for relief.¹

Lane's joinder in the Directors' motion should be denied for the reasons stated in the NCUA's opposition to that motion. In addition, the focus of the Directors' motion is that the NCUA's First Amended Complaint does not plead sufficient facts to overcome the presumption of California's business judgment rule. That rule does not apply to the acts and omissions of corporate officers like Lane.

The allegations against Lane are sufficient to put him on fair notice under Rule 8 of the Federal Rules of Civil Procedure of the claims against him. Contrary to Lane's arguments, there is no special pleading requirement for a breach of fiduciary duty claim against a corporate officer. In addition to the allegations specifically naming Lane, the First Amended Complaint contains numerous allegations of acts and omissions by the Officer Defendants, a group that included Lane.

THE ALLEGATIONS AGAINST LANE IN THE FIRST AMENDED COMPLAINT

The allegations of the First Amended Complaint are described in detail in the NCUA's Opposition to the Directors' Motion to Dismiss at pp. 4-7. With respect to

¹ Lane's motion is directed to the entire complaint. However, he does not include any arguments addressing the Sixth Claim for Relief for unjust enrichment as a result of an early payout of his retirement plan.

1 Lane, the First Amended Complaint alleges that he was WesCorp's Chief Financial
2 Officer from March 9, 1998 to April 18, 2008, and that he functioned as second-in-
3 command at WesCorp from 2004 until 2008. First Amended Complaint ("FAC")
4 ¶ 7. Lane, along with President and Chief Executive Officer Robert Siravo and
5 Executive Vice President and Chief Investment Officer Robert Burrell, were
6 WesCorp's primary management team and are referred to in the complaint (along
7 with Timothy Sidley) as the "Officer Defendants." FAC ¶¶ 6-9.

8 The First Amended Complaint alleges that Lane and the other Officer
9 Defendants prepared and proposed to the board of directors a budget for WesCorp
10 each year. FAC ¶ 65. As Chief Financial Officer, Lane was responsible for the
11 budget which, although it contained detailed information about the proposed
12 projected expenses and projected fee income, contained very little information about
13 the projected investment income, investment expense and net interest income,
14 except the monthly projected totals. *Id.* In particular, the budgets contained no
15 information about how the composition of WesCorp's investment portfolio would
16 need to change to achieve the net interest income projected in the budgets, and the
17 executive summary narratives for the budgets were also silent on the subject. *Id.*

18 The budgets prepared by Lane and the other Officer Defendants required an
19 increasing yield from WesCorp's investment portfolio. FAC ¶¶ 50, 66. They also
20 directed that WesCorp increase its borrowings to fund investments and increase the
21 spread required in its investment portfolio. FAC ¶ 66. Simply put, the budget with
22 its required yields was dictating the composition of WesCorp's investment portfolio,
23 and Lane as Chief Financial Officer was responsible for the budget.

24 The First Amended Complaint alleges that the increased yields were required
25 to generate large amounts of net interest income that was used to justify increased
26 compensation for WesCorp's top executives, including Lane. FAC ¶ 53. It further
27 alleges that as a result of an agreement made with Siravo and without board
28 approval, Lane received a \$1.3 million "early payout" of his retirement plan in 2006

1 and \$75,000 in additional retirement payments in both 2007 and 2008, on top of his
2 regular salary and bonus. FAC ¶¶ 106-109.

3 In requiring the increased yields, the First Amended Complaint alleges that
4 Lane, as part of the leadership team, caused WesCorp to lower its concentration of
5 U.S. Government Agency MBS in WesCorp's portfolio and increase its
6 concentration of higher risk private label mortgage-backed securities ("MBS").
7 FAC ¶ 55. The Officer Defendants never proposed concentration limits for Option
8 ARM MBS, despite the inherent riskiness of the product, never proposed policies
9 requiring tracking or reporting of the concentration of Option ARM MBS in
10 WesCorp's portfolio, never proposed policies requiring reporting of concentration
11 by tranche position, and recommended to WesCorp's board that WesCorp simply
12 raise its concentration limits for MBS so that it could meet the investment income
13 levels required by the budget. FAC ¶¶ 70-73.

14 The First Amended Complaint alleges that Lane and the Officer Defendants
15 were aware of the deteriorating housing market, the tightening investment spreads,
16 and the inability to find good investments. FAC ¶¶ 74, 75, 77. He was aware that
17 WesCorp was purchasing significant quantities of Option ARM MBS, but he, along
18 with the other Officer Defendants, failed to re-evaluate WesCorp's investment
19 strategy, concentration limits, or other matters to lower risk. FAC ¶¶ 31, 114.

20 The First Amended Complaint alleges that as a result of the failure of the
21 Officer Defendants to control WesCorp's concentration of Option ARM and lower
22 tranche MBS, WesCorp was required to recognize severe losses, which ultimately
23 led to its closure. FAC ¶¶ 78-80.

24 **APPLICABLE LEGAL STANDARD**

25 Dismissal under Rule 12(b)(6) for failure to state a claim is warranted only
26 where the complaint does not allege a claim supported by a cognizable legal theory
27 or if the complaint does not allege sufficient facts in support of a cognizable legal
28 theory. *See, Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988).

1 When considering a motion to dismiss under Federal Rule of Civil Procedure
2 12(b)(6), the court must accept as true all of the factual allegations set out in
3 plaintiff's complaint and draw inferences from those allegations in the light most
4 favorable to plaintiff. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988,
5 amended on other grounds, 275 F.3d 1187 (9th Cir. 2001). If a complaint "pleads
6 factual content that allows the court to draw the reasonable inference that the
7 defendant is liable for the misconduct alleged," the complaint survives a motion to
8 dismiss. *Ashcroft v. Iqbal*, __ U.S. __, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868
9 (2009). Given this standard, motions to dismiss for failure to state a claim are
10 disfavored and rarely granted. *Gilligan v. Jamco Development Corp.*, 108 F.3d 246,
11 249 (9th Cir. 1997).

12 LEGAL ARGUMENT

13 I. THE BUSINESS JUDGMENT RULE DOES NOT APPLY TO LANE.

14 The primary thrust of the Director's Motion to Dismiss, which Lane joins, is
15 that the allegations of the First Amended Complaint do not overcome the
16 presumption of the business judgment rule. As an officer, the business judgment
17 rule does not apply to Lane under California law.

18 Both Section 7321 and Section 309 of the California Corporations Code
19 explicitly apply only to directors. An officer may be liable for conduct that a
20 director would not be liable for, since the premise of the business judgment rule is
21 that disinterested directors are presumably acting in the best interests of the
22 corporation. *See Gaillard v. Natomas*, 208 Cal. App. 3d 1250, 1265 (1989). [See
23 discussion in the NCUA's Opposition to Motion to Dismiss Filed by Defendants
24 Siravo and Swedberg at pp. 18-19.]

1 **II. THE COMPLAINT PLEADS CLAIMS AGAINST LANE FOR BREACH**
2 **OF FIDUCIARY DUTY AND GROSS NEGLIGENCE.**

3 The NCUA incorporates by reference its Opposition to the Directors' Motion
4 to Dismiss regarding the sufficiency of the allegations to state claims for breach of
5 fiduciary duty and gross negligence against the Officer and Director defendants.
6 Lane, as an Officer Defendant, is alleged to have participated in the acts and
7 omissions set forth in the First Amended Complaint and is subject to liability on
8 those claims.

9
10 **A. The First Amended Complaint Sufficiently Alleges Negligent Breach**
11 **Of Fiduciary Duty As To Lane.**

12 As WesCorp's Chief Financial Officer and second-in-command, Lane was a
13 fiduciary of WesCorp. *GAB Business Services, Inc. v. Lindsey & Newsom Claim*
14 *Services, Inc.*, 83 Cal. App. 4th 409, 420 (2000); overruled on other grounds in
15 *Reeves v. Hanlon*, 33 Cal. 4th 1140, 1153-1154 (2004). The position of a corporate
16 officer demands: "the most scrupulous observance of his duty, not only
17 affirmatively to protect the interests of the corporation committed to his charge, but
18 also to refrain from doing anything that would work injury to the corporation."
19 *Bancroft-Whitney Co. v. Glen*, 64 Cal. 2d 327, 345 (1966), citing *Guth v. Loft*, 23
20 Del. Ch. 255, 5 A.2d 503, 510 (1939).

21 Whether Lane has exercised due care in fulfilling his duties to WesCorp is a
22 question of fact. *Brummett v. County of Sacramento* 21 Cal. 3d 880, 887 (1978);
23 *Laird v. T. W. Mather, Inc.*, 51 Cal. 2d 210, 215-216 (1958). The standard of care
24 for corporate officers is simple negligence; that is, Lane was required to exercise the
25 care, skill, and diligence in the management of the corporation's affairs that an
26 ordinarily prudent person would in the role of Chief Financial Officer of the
27 country's largest retail corporate credit union. *See, Burt v. Irvine Co.*, 237 Cal. App.
28 2d 828, 852 (1965).

1 The facts pled in the First Amended Complaint, and the reasonable inferences
2 that can be drawn from them, permit a fact finder to determine that Lane breached
3 the standard of care by, among other things, (1) allowing and encouraging WesCorp
4 to depart from its traditional, conservative business model and seek substantial
5 increases in investment portfolio income, without considering the additional credit
6 risk that WesCorp was taking or the safeguards or controls that would be required to
7 mitigate it; (2) providing unduly risky budgets without informing the WesCorp
8 board of the increasing level of risk that would be created in WesCorp's investment
9 portfolio by the increasingly large amounts of portfolio income he was budgeting;
10 (3) continuing to encourage WesCorp to obtain higher portfolio income, even after
11 receiving information in 2005 and 2006 that investment spreads were tightening and
12 that increasingly risky investments were therefore required to obtain the same yield
13 and portfolio income; (4) failing to advise the board to set concentration limits for
14 private label MBS, Option ARM MBS and lower tranche MBS that would allow
15 WesCorp to mitigate the risks in its investment portfolio; and (5) not providing
16 information to the board on the concentration of Option ARM MBS and lower
17 tranche MBS in WesCorp's investment portfolio.

18 Nothing in the First Amended Complaint establishes as a matter of law that
19 Lane's failures to manage WesCorp's finances prudently and to keep the board
20 appraised of risks in its business strategy was within the standard of care of a
21 reasonably prudent Chief Financial Officer of a federal credit union.

22 **B. The Allegations Against Lane Are Sufficient To State A Claim For**
23 **Gross Negligence.**

24 The NCUA's discussion of the directors and officers' liability for gross
25 negligence set forth at pages 20-23 of the NCUA's Opposition to the Directors'
26 Motion to Dismiss is incorporated by reference. In addition, Lane as Chief
27 Financial Officer and second-in-command at WesCorp was responsible for
28

1 overseeing the financial affairs of the credit union. The board was relying on him to
2 advise it as to prudent financial practices.

3 Whether particular conduct constitutes gross negligence is generally a
4 question of fact. *Decker v. City of Imperial Beach*, 209 Cal. App. 3d 349, 358
5 (1989). Whether Lane's alleged conduct was an extreme departure from what a
6 reasonably careful person in the role of Chief Financial Officer would do to prevent
7 harm to the credit union and its members cannot be determined on the face of the
8 complaint. It must be evaluated based on the evidence presented in this case. The
9 motion to dismiss this claim should be denied.

10 **C. The First Amended Complaint Sufficiently Alleges Lane's Roles and**
11 **Responsibilities Under Rule 8.**

12 Rule 8 of the Federal Rules of Civil Procedure requires the NCUA to set forth
13 "a short and plain statement of the claim," giving Lane fair notice of the claim being
14 asserted and the grounds upon which that claim rests. Lane proposes that the FAC
15 should be dismissed "if it lumps together its claims of breach of fiduciary duties
16 against an officer with the same claims against directors." Motion p. 23. However,
17 if Rule 8 is satisfied (*i.e.*, the complaint gives fair notice and states the basis for the
18 claim), "lumping" together defendants with respect to the same claims does not
19 render a complaint subject to dismissal.

20 Under the two cases Lane cites in his argument, the allegations of the First
21 Amended Complaint are well-pled. In *Bridgeport Holdings, Inc. Liquidating Trust*
22 *v. Boyer*, 388 B.R. 548 (Bankr. D. Del. 2008), plaintiff had filed an action against
23 directors and officers of multiple debtor entities for breach of fiduciary duty, among
24 other things. The officer defendants sought to dismiss the complaint for failure to
25 state a claim because the complaint failed to identify which office was held by 4 of
26 the 5 officers and failed to allege which of the five debtor entities each was an
27 officer of. The complaint collectively defined all the entities as the "Company" and
28 alleged no greater specificity.

1 Here, the First Amended Complaint expressly identifies Lane's position as
2 Chief Financial Officer of the one entity involved – WesCorp. It alleges facts
3 establishing either directly or through reasonable inference that Lane was
4 responsible for or participated in the conduct of the Officer Defendants alleged in
5 the First Amended Complaint including, but not limited to, breaches of fiduciary
6 duty and negligence with regard to setting budgets and income targets and failing to
7 manage WesCorp's risk. FAC ¶¶ 65, 66, 71-77, 111-114.

8 Similarly, in *Gantler v. Stephens*, 965 A.2d 695 (Del. 2009), the court denied
9 a motion to dismiss claims against two officers for whom allegations were lumped
10 together. The court reasoned that the allegations were sufficient to support
11 reasonable inferences that the First Vice President and Treasurer acted to aid and
12 abet the President and CEO in his breaches of fiduciary duty, given that the Vice
13 President's employment depended on the good will of the President "to retain his
14 job and the benefits that it generated." Because the Vice President was in no
15 position to act independently of the President, the court held that it could be inferred
16 that by assisting the President to "sabotage" the due diligence process, the Vice
17 President also breached his duty of loyalty. *Id.* at 709.

18 In this case, the allegations are sufficient to infer that Lane, by virtue of his
19 position and role at WesCorp as second in command, was acting in concert with the
20 other Officer Defendants and in particular, Siravo, in breaching his duty of care.
21 The First Amended Complaint gives Lane fair notice of the claims against him and
22 meets the requirements of Rule 8.
23
24
25
26
27
28

CONCLUSION

For the reasons set forth above and in the NCUA's Opposition to the Directors' Motion to Dismiss, the NCUA respectfully requests that Lane's motion to dismiss be denied.

DATED: November 22, 2010 LUCE, FORWARD, HAMILTON & SCRIPPS LLP
MICHAEL H. BIERMAN
MICHAEL E. PAPPAS

By: /s/ Michael H. Bierman
Michael H. Bierman
Attorneys For The National Credit Union
Administration Board As Conservator For
Western Corporate Federal Union

201080809.2